FILED
SEP 8 1980
MICHAEL RODAK, JR., CLERK

80-367
No.

In the Supreme Court of the United States

October Term, 1980

PRESBYTERIAN CHURCH OF HARRISBURG,
a non-profit Corporation,
Petitioner

versus

LIBERTY MUTUAL INSURANCE COMPANY,
a corporation,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BENJAMIN & ANGINO, P. C.
BY: RICHARD C. ANGINO
Attorneys for Petitioner

4503 North Front Street
Harrisburg, Pennsylvania 17110
717—238-6791

Murrelle Printing Co., Box 100, Sayre, Pa. 18840—(717) 882-0401

QUESTIONS PRESENTED

(1) Whether the Supreme Court of Pennsylvania, in refusing to review the decision of Pennsylvania's Superior Court, reaffirmed the Common Law doctrine of insurable interest in such a manner as to discriminate among similarly situated insureds in violation of the Fourteenth Amendment of the United States Constitution, where the judicially wrought classification bears no rational relationship either to preventing the end which the doctrine was designed to extirpate or to furthering any other legitimate State end.

The original caption and parties below were:

CHRIST GOSPEL TEMPLE, by BISHOP F. M. THOMAS, Trustee ad litem, Appellant

versus

LIBERTY MUTUAL INSURANCE COMPANY, a corporation, Appellee

versus

PRESBYTERIAN CHURCH OF HARRISBURG, a non-profit corporation, Appellant

Christ Gospel has been dropped as a party in the instant appeal because only Presbyterian Church's cause of action fulfills jurisdictional requirements for Supreme Court review.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Opinion Below	2
Jurisdiction	3
Constitutional Provisions Involved	3
Statement of the Case	4
Reason for Granting the Writ:	
(1) The Supreme Court of Pennsylvania reaffirmed the Common Law doctrine of insurable interest in such a manner as to discriminate among similarly situated insureds, in violation of the Fourteenth Amendment of the United States Constitution, where the Judicially wrought classification bears no rational relationship either to preventing the evil which the doctrine was designed to extirpate or to furthering any other legitimate State end	8
Conclusion	14
APPENDIX:	
Superior Court Opinion	1a
Dauphin County Opinion and Order	10a
Superior Court Judgment	22a
Letter From Pennsylvania Supreme Court Denying Allocatur	23a
Letter From Pennsylvania Supreme Court Denying Reconsideration	24a

TABLE OF CITATIONS

CASES:	
Abood v. Detroit Board of Education, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed. 2d 261 (1977)	5

Carr v. Union Mutual Insurance Co., 598 P.2d 269 (Court of Appeals of Oklahoma, 1979 15

Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed. 2d 349 (1972) 13

First Preferred Insurance Company v. Bell, 587 S.W. 2d 798 (Court of Civil Appeals of Texas, 1979) 15

Granite State Insurance Co. v. Lowe, 362 So. 2d 240 (Court of Civil Appeals of Alabama, 1978) 15

James v. Strange, 407 U.S. 128, 92 S.Ct. 2027, 32 L.Ed. 2d 600 (1972) 13

Manhattan Life Insurance Co. v. Cohen, 234 U.S. 123, 34 S.Ct. 874, 58 L.Ed. 1245 (1913) 6, 7

Royster Guano Co. v. Virginia, 253 U.S. 412, 40 S.Ct. 560, 64 L.Ed. 989 (1920) 12

Van Cure v. Hartford Fire Insurance Company, 435 Pa. 163, 253 A.2d 663 (1969) 8, 9, 10, 13

TEXTS:

4 Appleman, Insurance Law and Practice, §§2121-2125 11

1 Arnould, §§6, 306-390 .....11, 12

48 Columbia Law Review, 1162, 1169-75 (1948) 12

3 Couch on Insurance, §§24:1-24:13 11

I Goldin, Law of Insurance in Pennsylvania, 93 11

Richardson, Law of Insurance, §87 11

G. Salzman, The Law of Insurable Interest in Property Insurance, 522 Ins. L. J. 394 11

Vance, Insurance, §§29, 163-166 11

CONSTITUTIONAL PROVISION:

Fourteenth Amendment to the United States Constitution 3, 5, 8, 15

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

No.

CHRIST GOSPEL TEMPLE [illegible] BISHOP [illegible]

PRESBYTERIAN CHURCH OF HARRISBURG,
a non-profit Corporation,
Petitioner

versus

LIBERTY MUTUAL INSURANCE COMPANY,
a corporation,
Respondent

P [illegible] Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

The Petitioner, Presbyterian Church of Harrisburg, respectfully prays that a writ of certiorari issue to review the order of the Supreme Court of Pennsylvania entered in this proceeding on June 9, 1980.

OPINION BELOW

No opinion was rendered by the Supreme Court of Pennsylvania; a copy of the orders refusing allocatur appear in the Appendix hereto. The opinion of the Superior Court of Pennsylvania has not yet been reported officially; it was issued by the Court under Docket No. 242 March Term, 1978. This opinion affirmed the opinion of the Dauphin County Court of Common Pleas, 100 Dauphin Co. R. 391 (1978), which also appears in the Appendix hereto. Both Courts held that despite making insurance payments for many years, Plaintiff could not recover because its property interest was insufficient to qualify as an "insurable interest".

JURISDICTION

The Supreme Court of Pennsylvania entered its order denying Christ Gospel's and Presbyterian's application for reconsideration of denial of allocatur on June 9, 1980. This petition for certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV to the United States Constitution:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

For many years, the congregation of Westminster Presbyterian Church worshipped in a beautiful stone building, which eventually gained recognition as a historical landmark. The Westminster Congregation merged with another Presbyterian group, The Presbyterian Church of Harrisburg in August of 1972; in the merger, Presbyterian Church acquired title to the Westminster property. Finding itself with an excess of church space and anxious to utilize its historical structure, The Unified Presbyterian Congregation deeded the property to a small black group, Christ Gospel Temple, for the nominal sum of $9,000.00.

However, the deed from Presbyterian to Christ Gospel was conditional upon a strict right to repurchase for the same nominal consideration should Christ Gospel cease to use the Church for purposes of Christian worship. This reverter clause explicitly states that the named consideration is premised upon Presbyterian's desire to assure the Church's continued use for that purpose.

Presbyterian and Christ Gospel sought to protect their respective interests from fire or other catastrophe by executing an assignment of Westminster's original insurance to the Church's new occupants; unfortunately, their Attorney neglected to notify the insurance carrier, Liberty Mutual, of the assignment. Westminster had paid Liberty many thousands of dollars over the years for protection against catastrophe, and the insurer periodically inspected the Church site in an effort to discover problems that could result in loss. During one such inspection, an agent

for Liberty Mutual discovered the transfer of interest and so notified his principals. The insurance company, although realizing that the assignment without notice to the carrier would void coverage to Christ Gospel, did not inform the Church's new owner of its peril. Thus, when fire did substantially destroy the Church structure, Christ Gospel found itself without a fire insurance fund to indemnify it for its tragic loss.

Both Presbyterian and Christ Gospel ultimately sued Liberty Mutual for the proceeds of the original fire insurance fund, and both were denied relief in the Common Pleas Court of Dauphin County and Superior Court of Pennsylvania. The claimants petitioned the Supreme Court of Pennsylvania for allowance of appeal, which was denied; the Supreme Court similarly dismissed their application for reconsideration.

A full rendition of the legal theories which Christ Gospel and Presbyterian advanced in the State Courts of Pennsylvania, or of the litigation's tangled procedural history, is unnecessary for purposes of this appeal. The only federal issue extant is Presbyterian's claim that the trial and Superior Courts have contrived an interpretation of the Common Law doctrine of insurable interest which invidiously discriminates against the property rights of insureds like Presbyterian, contrary to the Fourteenth Amendment's guarantee that no state shall deprive its citizens of the equal protection of the law. The Pennsylvania Supreme Court, by refusing to review the Superior Court's decision, has placed this issue in a proper posture to petition for a writ of certiorari; see: *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed. 2d 261 (1977).

Presbyterian did not explicitly argue its constitutional claim below; nor did the Courts make an explicit ruling upon it. Nevertheless, the Supreme Court may, at this time, take jurisdiction over the federal issue. The basis for jurisdiction was cogently expressed by the Court in *Manhattan Life Insurance Co. v. Cohen,* 234 U.S. 123, 34 S.Ct. 874, 58 L.Ed. 1245 (1913):

> It is elementary that a Federal question may not be imported into a record for the first time by way of assignments of error made for the purposes of review by this court. Moreover as a general rule it is true that for the purposes of review by this court rights under the full faith and credit clause, §1, Article IV of the Constitution, come within that class which are required to be expressly set up and claimed in the court below. *Johnson v. New York Life Ins. Co.,* 187 U.S. 491; *El Paso and Southwestern R.R. v. Eichel,* 226 U.S. 590, 597; *Chicago Ind. and L. Ry. Co. v. Hackett,* 228 U.S. 559, 565. Let it be conceded, as we think it must be, where the record leaves no doubt that rights under the full faith and credit clause were essentially involved and were necessarily passed upon, there would be jurisdiction to review even although such rights had not been expressly asserted below (see Tilt v. Kelsey, 207 U.S. 43, 51); *the right to review under such condition being in effect but a result of the elementary rule that it is irrelevant to inquire how and when a Federal question was raised in a court below when it appears that such question was actually considered and decided.* 234 U.S. at 134 (emphasis added).

The doctrine of insurable interest, in its newly promulgated form, is not an enactment of Pennsylvania's legislature but the Courts' response to the very claims asserted by the parties in the present case. It is law by judicial fiat and, as such, has undergone a quiet but unavoidable evaluation as to its constitutionality by the Courts which created it. In deciding that this misbegotten doctrine should be the law in Pennsylvania, the Superior and Supreme Court necessarily approved its immunity from constitutional attack—either State or Federal. Thus, it is "irrelevant to inquire how and when [the] Federal question was raised . . . below . . ." 234 U.S. at 134.

REASON FOR GRANTING THE WRIT

---

(1) The Supreme Court of Pennsylvania reaffirmed the Common Law doctrine of insurable interest in such a manner as to discriminate among similarly situated insureds, in violation of the Fourteenth Amendment of the United States Constitution, where the judicially wrought classification bears no rational relationship either to preventing the evil which the doctrine was designed to extirpate or to furthering any other legitimate State end.

The doctrine of insurable interest has a long history, both in Pennsylvania and elsewhere, and has been the subject of much judicial scrutiny. Nevertheless, the rationale for forbidding those with no legally cognizable interest in property from insuring against its destruction is quite simple and universally accepted. As a matter of public policy, the law is attempting to discourage the result insured against. In other words, the law will not tempt those people who place no value upon the continued existence of a certain property to cause its destruction (whether intentionally or negligently) in order to collect the insurance funds. See: *Van Cure v. Hartford Fire Insurance Company,* 435 Pa. 163, 253 A.2d 663 (1969), and the cases cited therein.

The *Van Cure* decision, supra, is still the leading Pennsylvania Supreme Court decision on insurable interest in Pennsylvania. The majority opinion discusses, at some length, the two competing theories of insurable interest.

Reason for Granting the Writ

The "legally enforceable interest" theory requires that an insured have some right in the relevant property enforceable either at law or in equity. This definition hearkens back to the doctrine's origin in Enghteenth Century England. The more modern trend may be termed the "factual expectation" theory:

> The second theory which enjoys greater support from text writers, is termed the 'factual expectation' theory. It states that 'anyone who has an expectation of economic benefit from the preservation of property or an expectation of loss from its destruction, regardless of his relation to the property, has an insurable interest.' This is a broad approach which covers not only all legal interests but other interests as well. It is more closely allied to the concept of indemnity for often a man with no legally enforceable interest may suffer more from the destruction of property than a man who holds title. 435 Pa. at 163.

A careful reading of *Van Cure* reveals that the Court does, indeed, accept the factual expectation theory of insurable interest. The Court reviews the history of relevant Pennsylvania decisions and finds that this theory has long been favored here; see especially *Van Cure* at 435 Pa. 163. The *Van Cure* case itself involved a somewhat unusual situation, where the claimant's property had been condemned prior to its destruction by fire, and bond, representing just compensation, already posted. The claimant argued that, because under The Eminent Domain Code she might have the right to reclaim the property should the Urban Redevelopment Authority abandon its plans, she had an insurable interest.

Reason for Granting the Writ

The Supreme Court found that Mrs. Van Cure's interest was far too remote to constitute any realistic expectation, and that her claim fail under any definition of insurable interest. The Supreme Court was faithful to the principles which underlie and justify its doctrine of insurable interest in *Van Cure,* because it is apparent that, once the claimant was assured of substantial compensation for the taking, she had no reason to care whether the property burned or not. Indeed, had Mrs. Van Cure been able to recover insurance money, she would have garnered a windfall.

The Court in deciding Presbyterian's interest in the present case, has departed from its sound interpretation of insurable interest, and fashioned a rule whose mechanical application only insures that a substantial group of people will forfeit their contractual right to fire insurance benefits. The law of Pennsylvania now forbids any person with only the expectancy of an option to purchase from insuring his interest, without any inquiry as to whether that interest does or could motivate that individual to desire the property's continued existence. While the *Van Cure* Court held that the condemnee's expectancy of an option to purchase was insubstantial, and incapable of qualifying as an insurable interest, it only did so after making a realistic evaluation of the risk posed to the insured property.

The utter absurdity of the Superior and Supreme Courts' present rule is highlighted by examining the facts of the present case. Presbyterian deeded its church to Christ Gospel Temple for a nominal sum in order to give a poor black congregation a home, but required that should it lose the satisfaction of seeing the building used for chris-

tian worship, it could, within a period of ten years, repurchase for the same nominal figure. Presbyterian had *every* reason to desire the church structure's continued existence. It had, in effect, bartered its pecuniary interest in the building for the charitable satisfaction of knowing that it remained a house of Christian worship. However, Presbyterian realized that small congregations were not infrequently disbanded, and so sought to protect its substantial monetary investment in the building through the reverter clause. In plain language, if Presbyterian could not have its satisfaction, it wanted its property.

The effect of the Court's judicial fiat is to classify many contingent yet undeniably valuable property rights as outside the scope of insurable interests, regardless of whether the fact of insurance would increase the risk of hazard to the property involved. Contrastingly, many other interests of equal or lesser value may qualify as insurable, though they offer no greater assurance that the relevant property will not be neglected or intentionally damaged.

More precisely, the Courts have denied the right to contract for insurance to a class of people with an expectancy of an option to purchase, while granting it to others similarly situated in terms of the value of their interest to them. Every imaginable type of interest has been noted in the national encyclopedias, insurance texts, law review articles, etc. See, 3 *Couch on Insurance,* §§24:1-24:13; 4 Appleman, *Insurance Law and Practice,* §§2121-2125; I Goldin, *Law of Insurance in Pennsylvania,* 93; Richardson, *Law of Insurance,* §87; Vance, *Insurance,* §§29, 163-166; G. Salzman, *The Law of Insurable Interest in Property Insurance,* 522 Ins. L. J. 394; 1 *Arnould,* §§6,

306-390; 48 *Columbia Law Review,* 1162, 1169-75 (1948). Lessors, lessees, mortgagors, mortgagees, receivers, remaindermen, option holders, reversioners, stockholders, sellers, buyers, bailors, bailees, contractors, persons with possession, persons without, promised recipients under wills or oral contracts and many others with even more tenuous connections to the insured property have been included. The Court's discriminatory treatment of Presbyterian's interest is unwarranted and cannot be justified, even granting that a classification which does not impinge upon a fundamental right or suspect class will stand if rationally related to any legitimate State end.

The principles which guide a proper analysis were succinctly stated in *Royster Guano Co. v. Virginia,* 253 U.S. 412, 40 S.Ct. 560, 64 L.Ed. 989 (1920):

> It is unnecessary to say that the 'equal protection of the laws' required by the Fourteenth Amendment does not prevent the States from resorting to classification for the purposes of legislation. Numerous and familiar decisions of this court establish that they have a wide range of discretion in that regard. But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. 253 U.S. at 415.

While the large majority of cases evaluated under the "minimum rationality" test have been decided in favor of the State, a significant minority hold that the discrimination is capricious and thus unconstitutional where its logic is foreign to the object of the legislation which creates it.

This result is especially common where the discrimination is not aimed primarily at business or economic regulation, but is the result of implementing some moral standard particularly applicable to individuals. For example. in *Eisenstadt v. Baird,* 405 U.S. 438, 92 S.Ct. 1029, 31 L. Ed. 2d 349 (1972), this Court held that a Massachusetts law which forbade the prescription of contraceptive devices to unmarried people but allowed married couples access to birth control was not rationally related to the legitimate State interest in preserving the family. See also: *James v. Strange,* 407 U.S. 128, 92 S.Ct. 2027, 32 L.Ed. 2d 600 (1972).

The doctrine of insurable interest is grounded in the law's abhorrence of gambling, although its aversion has perhaps lessened somewhat when one considers the popularity of the State lottery activities. Nevertheless, wagering contracts of insurance were and still are considered a vice whose unchecked consequence is arson. Insurance "betting", like many other kinds of gambling, has many profound social implications. See the discussion in *Van Cure* and the authorities cited therein, *supra.*

While the United States Constitution does not deny the judiciary the right to control vice, it does require that any resulting classifications be, at a minimum, rationally related to this end. However, when the Pennsylvania Courts held in this case that no one with a mere expectancy of an option to purchase could insure his interest, it lost sight of the end it supposedly served. As previously indicated, the facts of this case demonstrate that such an expectancy may be substantial, and that its owners are taking a great gamble in *not* protecting it with insurance Moreover, the interests of Presbyterian are not unique in

their value. A little imagination will reveal many, many contingencies which are of great worth to their holders, and for which insurance is entirely appropriate.

Of course, a classification which is somewhat over-inclusive may still pass muster under the minimum rationality test. However, the nature of the factual expectation theory of insurable interest requires that the great majority of purchase options, and similar expectancies, have legally cognizable value. An option holder—even one whose option may never ripen—suffers "an expectation of loss" from the destruction of the relevant property. Before he had something, even if only a potential; after the property's destruction, he has nothing. The question is not whether these expectancies have value, but only of their amount. Certainly, no sane individual would neglect or destroy property having some value to him, which would dissipate upon the property's demise.

Logic demands the conclusion that the class now subject to arbitrary and unjustifiable discrimination is constitutionally significant, because it comprises almost all those possessing an expectancy of an option to purchase. The individual whose expectancy gives him no reason to care that the relevant property remain intact is the rare exception rather than the rule.

CONCLUSION

Pennsylvania's Supreme Court has created, by judicial fiat, a concept of insurable interest which deprives a constitutionally significant class of their right to contract for insurance. This discrimination fails to advance the State's

legitimate interest in preventing wagering contracts of insurance, because the vast majority of those people possessing an expectancy of an option to purchase do, almost by definition, prefer that the property subject to their expectancy remain intact. The classification is not rationally related to this or any other legitimate State interest, and is, therefore, abhorrent to the guarantee of equal protection embodied in the Fourteenth Amendment.

The Court undoubtedly realizes that unless it acts to eliminate this constitutional injustice, many people and groups will suffer a forfeiture to their great loss. It is worth noting that the Courts in many other States have redefined or expanded the concept of insurable interest in a manner which comports with modern notions of due process and equal protection. Recent examples may be found in: *First Preferred Insurance Company v. Bell,* 587 S.W. 2d 798 (Court of Civil Appeals of Texas, 1979); *Carr v. Union Mutual Insurance Co.,* 598 P.2d 269 (Court of Appeals of Oklahoma, 1979); *Granite State Insurance Co. v. Lowe,* 362 So. 2d 240 (Court of Civil Appeals of Alabama, 1978).

The two hundred year old judicial doctrine of insurable interest may have continued validity if, but only if, it steps in time with the Federal Constitution, as interpreted by the United State Supreme Court. The doctrine of insurable interest is capable of a constitutionally valid construction; the key is limiting its effect to those individuals without any genuine interest in the safety of an insured property. Unfortunately, the Courts of Pennsylvania have chosen to define and apply it in a thoughtless and mechanical way. Pennsylvania's doctrine does violence to the letter and spirit of the Fourteenth Amendment.

Reason for Granting the Writ

For all these reasons, it is respectfully requested that a writ of certiorari issue to review the order of the Supreme Court of Pennsylvania, denying Christ Gospel's and Presbyterian's petition for allocatur and application for reconsideration thereof.

Respectfully submitted,

BENJAMIN & ANGINO, P. C.,
RICHARD C. ANGINO,
Counsel for Petitioner

4503 N. Front Street
Harrisburg, Pennsylvania 17110

CERTIFICATE OF SERVICE

I hereby certify that on this Fifth day of September, 1980, five copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to James K. Thomas, P. O. Box 999, Harrisburg, Pennsylvania 17108. I further certify that all parties required to be served have been served.

(s) RICHARD C. ANGINO
RICHARD C. ANGINO
Counsel for Petitioner

4503 N. Front Street
Harrisburg, Pennsylvania 17110

APPENDIX

IN THE SUPERIOR COURT OF PENNSYLVANIA
Harrisburg District

No. 242 March Term, 1978

CHRIST GOSPEL TEMPLE, by BISHOP F. M. THOMAS, TRUSTEE AD LITEM,
Appellant

vs.

LIBERTY MUTUAL INSURANCE CO., a corporation,
Appellee

vs.

PRESBYTERIAN CHURCH OF HARRISBURG, a non-profit corporation,
Appellant

Appeal From the Order of the Court of Common Pleas of Dauphin County, Civil Action—Law, at No. 611 January Term, 1974.

Before SPAETH, J., HESTER, J. and MONTGOMERY, J.

Opinion by MONTGOMERY, J., filed Dec. 21, 1979:

The Appellants appeal from the entry of a judgment in favor of Defendant-Appellee Liberty Mutual Insurance Co., in an action wherein Appellants sought to recover

purported losses sustained in a fire to a church building in Harrisburg, Pennsylvania. Both the procedural and the substantive histories of this case are long and complicated. A recitation of the background of the case is appropriate prior to any discussion of the issues raised by the parties.

The record shows that for many years, the congregation of Westminster Presbyterian Church (hereinafter referred to as "Westminster") owned and occupied a church building at Green and Reily Streets in the City of Harrisburg. In May, 1968, Westminster purchased a fire insurance policy on this building from the Appellee, Liberty Mutual Insurance Co. (hereinafter referred to as "Liberty"). The policy was written for an initial term of three years, and in May, 1971, was renewed for an additional three years. Premiums were paid annually and the last premium was paid by Westminster to cover the period from May, 1972 through May, 1973. Apparently for reasons of declining membership, in August, 1972, Westminster merged into another Presbyterian organization, the Appellant Presbyterian Church of Harrisburg (hereinafter referred to as "Presbyterian"). In the merger, Presbyterian acquired the former Westminster property at Green and Reily Streets. On December 19, 1972, Presbyterian conveyed that property for $9,000 to the Appellant Christ Gospel Temple (hereinafter referred to as "Christ Gospel"). Presbyterian also made a written assignment to Christ Gospel of Westminster's insurance policy with Liberty, for a separate consideration of $750. That amount apparently represented that part of the policy premium paid in advance for the remainder of the annual policy term. In its deed to Christ Gospel, Presbyterian

retained an option, for a period of ten years, to repurchase the property for the original sale price if the premises ever ceased to be used for Christian services.

Liberty was not notified by the parties of the merger of Westminster and Presbyterian nor of the sale by Presbyterian of the property to Christ Gospel. Also, Liberty was not notified by the parties of the purported assignment of the fire insurance policy on the property from Presbyterian to Christ Gospel. On February 9, 1973, an agent of Liberty, as a result of a visit to the church, learned of the merger and the later sale of the property and reported these facts to Liberty. Ten days later, on February 19, 1973, fire substantially damaged the church structure.

Liberty denied coverage and Christ Gospel thereafter filed suit against Liberty for the fire loss. Also, Christ Gospel named as a defendant the attorney who had represented Christ Gospel at the time it purchased the premises. The theory of liability against the attorney-defendant was that he had failed to properly secure fire insurance coverage as he had promised his client he would. The attorney-defendant joined Presbyterian as an additional defendant, on the theory that Presbyterian incurred liability to Christ Gospel for not effecting a valid assignment of the policy. Presbyterian then filed a cross-claim against Liberty, asserting that if Christ Gospel was not covered under the policy, then Presbyterian could recover for the loss since it claimed a continuing insurable interest in the property.

Liberty's defense to the claim of Christ Gospel was that it had not been notified of the merger of the churches and did not agree to the continuation of the policy by

Presbyterian, the successor corporation. Further, Liberty contended that even assuming an interest in the policy by Presbyterian, the assignment to Christ Gospel, without the consent of Liberty, was not binding upon the insurer. With respect to the cross-claim filed by Presbyterian, Liberty asserted the lack of notice of the merger, claimed a lack of any insurable interest on the part of Presbyterian, and also argued that Presbyterian had been divested of any interest in the property when it assigned its rights under the insurance policy to Christ Gospel for full and adequate consideration. With respect to the purported assignment of the policy from Presbyterian to Christ Gospel, Liberty relied greatly in its defense upon a clause in the insurance policy which provided that: "Assignment of this policy shall not be valid except with the written consent of this Company."

These matters went to trial, before a jury, beginning on March 14, 1977.[1] On or about March 22, 1977, the insurer which provided professional liability insurance for the defendant-attorney settled the claim of Christ Gospel against that attorney for $125,000. The claim of Christ Gospel against Liberty was thereupon dismissed by ruling of the trial court. Also, at that point, counsel for Christ Gospel (not the same attorney who had represented them at the sale) informed the court that he would henceforth represent Presbyterian on its cross-claim against

---

[1] The proceedings were transferred for a time during the pretrial stage to the United States District Court for the Middle District of Pennsylvania. However, the case was remanded to the Dauphin County Court for trial and disposition and the Federal Court has not had any further involvement in proceedings.

Liberty under the fire insurance policy. The trial of Presbyterian against Liberty resumed, but on March 24, 1977, the trial court declared a mistrial, on the basis that the settlement of the claim of Christ Gospel against the defendant-attorney, and the termination of its claim against Liberty, had made it improper for the jury to now deal with the cross-claim of Presbyterian against Liberty. That dispute had not, to that point, been the focus of proceedings during the trial.

Subsequent to that action by the trial court, Motions for Summary Judgment were filed by both Presbyterian and Liberty. Both Motions were denied by the Court in an Order dated December 27, 1977.[2] After other proceedings which are not relevant to this appeal, the matter was subsequently heard in a non-jury trial on March 31, 1978. A verdict was returned in favor of Liberty. Following the denial of exceptions to that verdict in the lower court, both Christ Gospel and Presbyterian have filed the instant appeal in our Court.

The Appellants, in an extensive brief and in oral argument, have offered a plethora of complicated arguments to support their request for reversal in this case. None, however, have arguable merit. While the factual and procedural background of the case is unquestionably complex, a resolution of the issues presented is possible by reference to a few simple principles of law, well established in our Commonwealth. Such principles indicate clearly that affirmance is appropriate.

---

[2] The parties had also filed appeals to the Superior Court but both were withdrawn

We first address the rights of Christ Gospel against Liberty. Although Christ Gospel is an appellant in this action, no real emphasis is directed on this appeal to contentions that Christ Gospel has any arguable basis upon which it can recover against Liberty for any fire loss to the church building. Christ Gospel, if it had any rights against Liberty, would enjoy those rights by virtue of the purported assignment to it by Presbyterian of the latter's rights under the Liberty policy. Even if we assume that Presbyterian held the position of an insured on the policy, after Presbyterian's merger with Westminster, the original insured, we cannot ignore the import of the provision on the front page of the policy which provides that "Assignment of this policy shall not be valid except with the written consent of this Company."

Although the Appellants argue on several grounds,[3] that we must ignore that clear prohibition against assignments without Liberty's consent, we can find no legal basis for doing so. The provision in question is not simply a self-protective clause inserted at the whim of the Appellee, but rather is a legislatively mandated provision, *specifically required* to be included in fire insurance policies such as the one in issue in the instant case. See Act of May 17, 1921, P.L. 682, Art. V, §522, as amended by the Act of July 12, 1935, P.L. 959, §1, as amended by the Act of April 25, 1945, P.L. 307, §1, as amended by the Act of July 19, 1951, P.L. 1100, §19, as amended by the Act of

---

[3] For instance, it is brought to our attention that insurance policies have been called contracts of adhesion and are to be strictly construed in favor of the policyholder and against the insurer.

June 9, 1959, P.L. 460, §1, as amended by the Act of August 23, 1961, P.L. 1081, §1, 40 P.S. §636.[4] In view of the lack of consent of Liberty to the assignment of the policy by Presbyterian to Christ Gospel, the latter has no rights under the policy.

We find no merit to the proposition that Liberty is estopped from contesting the assignment on the basis that its agent inspected the premises just a few days before the fire and was aware of the sale of the property to another congregation. It is well settled that a fire insurance policy is a *personal* contract of indemnity, and is on the insured's *interest* in the property, *not on the property itself. Gorman's Estate,* 321 Pa. 292, 184 A.86 (1936).[5] Therefore, we find no basis for the claim asserted by Christ Gospel against Liberty in the instant case.

We reach a similar conclusion with respect to Presbyterian's claim, but on a different rationale. Although Liberty contends that the merger of Westminster into Presbyterian afforded the latter no rights on the policy, since Liberty did not consent to afford coverage on the policy to Presbyterian, for purposes of this appeal we will assume that Presbyterian succeeded to all the legal right of Westminster on the policy at the time of the fire loss. Even with that assumption in favor of Presbyterian, how-

---

[4] Later amended, in parts irrelevant to this appeal, by the Act of March 13, 1974, P.L. 187, No. 33, §1, 40 P.S. §636 pocket part.

[5] On this point see *Donovan v. New York Casualty Company,* 373 Pa. 145, 94 A.2d 570 (1953); *Spires v. Hanover Insurance Co.,* 364 Pa. 52, 70 A.2d 828 (1950); 43 Am. Jur. 2d, Insurance, §687; 16 Couch on Insurance 2nd, §§63:14 and 63:160; 5A Appleman on Insurance, §4325.

ever, we cannot find that it enjoyed the required *insurable interest* in the property at the time of the fire as to allow it to recover any amount as a result of the fire loss on February 19, 1973.

Presbyterian conveyed the property to Christ Gospel on December 19, 1972. Its only remaining legal interest in the property was an option to repurchase, at the original selling price within a ten year period, in the event that the property was used for purposes other than for the holding of Christian services. Thus, on the date of the fire loss, Presbyterian had a mere possibility of the expectancy that it might exercise its option to repurchase upon the happening of a contingency. Under prevailing law, this does not amount to an insurable interest. An excellent case on point is *Van Cure v. Hartford Fire Insurance Co.*, 435 Pa. 163, 253 A.2d 663 (1969). In *Van Cure* the Court recognized the long-established principle that an insurable interest in the property is demanded prior to recovery for a fire loss in Pennsylvania, and that a mere expectancy of an option to purchase is ". . . insubstantial and incapable of qualifying as an insurable interest." 435 Pa. at 167, 253 A.2d at 667. Further, in that case the Supreme Court discussed the theories of insurable interest, as such concepts developed in our case law dating from the decisions of the English courts in the nineteenth century. The extensvie discourse on the law pertaining to insurable interest by the Court in *Van Cure,* makes a repetition of the same matters here wholly unnecessary. What is particularly significant to the issue presented in the instant case is the recognition by the Supreme Court in *Van Cure* that after the transfer of ownership, a mere expectancy of an option to repurchase

property, in the event of the occurrence of a contingency, is insufficient to create an insurable interest under any legal theory. While the *Van Cure* case involved the rights of a condemnee when a fire damaged the insured property after condemnation, we find the rationale directly applicable in our analysis of Presbyterian's claim on this appeal.[6] Plainly, Presbyterian's claim must fail because it lacked a legally required insurable interest in the building on the date of the fire loss. Thus, we can discern no error in the action of the lower court in dismissing the claims of both Appellants.

In view of our conclusion, we do not deem it necessary to discuss Liberty's assertion that Presbyterian divested itself of any legal rights under the policy when it purportedly assigned the policy, for consideration, to Christ Gospel in December, 1972. Moreover, because we find that Presbyterian enjoyed no insurable interest after the sale to Christ Gospel, and in recognition of the rule that a fire insurance policy is a personal contract of indemnity based on the interest of the party, and not on the property itself, we find no merit in Presbyterian's contention that any notice enjoyed by Liberty as a result of its agent's inspection prior to the fire, resulted in a waiver of Liberty's defenses against Presbyterian in the case. Finally, we find no merit to the contention by Appellants that the trial court considered irrelevant matters or expressed bias in the case.

Affirmed.

---

[6] In *Van Cure, supra*, the condemnee was still living in the property at the time of the fire, making her claim of an insurable interest much more compelling, on an equitable basis, than that asserted by Presbyterian in this case.

IN THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY, PENNSYLVANIA

Civil Action—Law

No. 611 January Term 1974

In Assumpsit and Trespass

CHRIST GOSPEL TEMPLE, by BISHOP F. M. THOMAS, Trustee ad Litem,

Plaintiff

v.

LIBERTY MUTUAL INSURANCE COMPANY, a corporation,

Defendant

v.

PRESBYTERIAN CHURCH OF HARRISBURG, a non-profit corporation,

Additional Defendant

OPINION

BY THE COURT:

This matter is before the court on exceptions filed by Presbyterian Church of Harrisburg to a verdict entered in favor of Liberty Mutual Insurance Company in a non-jury trial.

The history of this proceeding is extensive and to fully appreciate its current status it is necessary to sketch the

factual history that gave rise to the litigation and to outline what has previously occurred in this dispute.

For many years the congregation of Westminster Presbyterian Church (Westminster) owned and occupied a place of worship at Green and Reily Streets in the City of Harrisburg. In May of 1968 Westminster purchased a contract of insurance on its building with Liberty Mutual Insurance Company (Liberty), whereby Liberty provided certain insurance coverages, including fire, to Westminster. The policy was written for three years and in May 1971 was renewed for three additional years. Premiums were paid annually and Westminster last paid the premium for the period from May 1972 to May 1973.

Having experienced declining membership, and perhaps for additional reasons, in August 1972 Westminster merged into another Presbyterian organization, the Presbyterian Church of Harrisburg (Presbyterian), with the latter acquiring the former Westminster Church property in the marriage. Having no use for the Westminster building, on December 19, 1972, Presbyterian conveyed the property for $9,000.00 to Christ Gospel Temple. Presbyterian also made a written assignment to Christ Gospel of Westminster's insurance policy with Liberty for a separate consideration of $750.00, which amount approximated the unexpired premium paid in advance for the then current year. Unfortunately Liberty was not notified of the merger of Westminster and Presbyterian, or of the sale by Presbyterian of the Westminster premises to Christ Gospel, nor of the assignment of the insurance policy to Christ Gospel.

On February 19, 1973, the property sustained substantial fire damage and a claim was made by Christ Gos-

pel under the insurance policy. Liberty denied coverage and suit was filed on February 13, 1974. The defense to the claim of Christ Gospel was twofold: (1) Liberty was not notified of the merger of the churches and did not agree to the continuation of the policy by the successor corporation; and (2) even assuming an interest in the policy by Presbyterian, the assignment to Christ Gospel was not binding as to Liberty. *Also named as a defendant by Christ Gospel was the attorney who had represented Christ Gospel at the time it purchased the premises. The theory of liability against the defendant-attorney was his failure to secure fire insurance coverage, as he had promised his client.* The defendant-attorney joined Presbyterian as an additional defendant, suggesting that it incurred liability to Christ Gospel for not effecting a valid assignment of the policy. *Presbyterian then filed a cross-claim against Liberty,* asserting that if Christ Gospel was not covered under the policy, then Presbyterian had an insurable interest and a right to recover thereunder. The defense to the claim of Presbyterian is based on (1) lack of notice of the merger of the churches, (2) lack of an insurable interest and, (3) the divestiture by Presbyterian of any interest it may have had in the policy when it assigned it to Christ Gospel for a full and adequate consideration.[1]

These matters went to jury trial which began on March 14, 1977. On or about March 22, 1977, the professional liability carrier for the defendant-attorney settled

---

[1] This proceeding was transferred for a time during the pleading stage to the U.S. District Court for the Middle District of Pennsylvania, but was remanded to Dauphin County for trial and disposition.

Christ Gospel's claim against him for $125,000.00 and the claim of Christ Gospel against Liberty was dismissed by a ruling of the trial court. Also at this point counsel for Christ Gospel informed the court that he would henceforth represent Presbyterian on its cross-claim against Liberty under the fire insurance policy.[2] The trial of Presbyterian against Liberty resumed but on March 24, 1977, the court declared a mistrial, giving as its reason that the settlement of the claim of Christ Gospel against the defendant-attorney and the termination of its claim against Liberty had made it unfair and unjust for the jury to now have to deal with the cross-claim of Presbyterian against Liberty, which had not been the focal point of the case to that point.

The claim of Presbyterian against Liberty was subsequently heard in a non-jury trial on March 31, 1978, and a verdict was returned in favor of Liberty. Exceptions to the verdict were filed and are the subject matter before the court at this writing.

We have concluded that Presbyterian was not insured by the Liberty policy at the time of the loss for the following reasons: (1) Liberty was not notified of the merger between Westminster and Presbyterian; (2) any arguable ownership interest of Presbyterian in the policy was divested by Presbyterian's own act when it executed (for consideration) a written assignment of its "right, title and interest" in the policy to Christ Gospel; and (3) Presbyterian had no insurable interest in the property in any

---

[2] There appears to be an agreement between Christ Gospel and Presbyterian concerning the disposition of any recovery against Liberty by Presbyterian in the present action.

event. Before discussing these decisions individually certain principles of insurance law, which apply generally to the facts at hand, should be reviewed.

Courts have long recognized that fire insurance policies are personal contracts of indemnity; *the insurance is on the insured's interest in the property, not on the property itself. Gorman's Estate,* 321 Pa. 292, 184 A. 86 (1936). It has been stated that an insurer has the privilege of choosing the persons to whom it is willing to issue a policy and the right to deal exclusively with the named insured without recognizing alleged interests of persons toward whom it assumed no obligation. See *Spir's v. Hanover Fire Ins. Co.,* 364 Pa. 52, 58, 70 A.2d 828, 831 (1950). Thus, fire insurance provisions requiring the insurer's consent to an assignment of the policy have been held valid and enforceable, *primarily because a change in ownership may well increase the risk or hazard of loss.* See 5A Appleman, *Insurance Law and Practice,* §3421 at 337 and §3425 at 357, and 16 *Couch on Insurance* 2d §63:160.

In certain situations where the interest in a policy has passed by operation of law, courts have recognized exceptions to this general rule. See *National American Ins. Co. v. Jamison Agency, Inc.,* 501 F.2d 1125 (8th Cir. 1974). These exceptions have arisen in part due to the modern trend toward consumerism, of which we are mindful, and are often expressed in terms of the courts' refusal to apply the traditional rules of law mechanically where the reasons for these rules do not exist. *Imperial Enterprises, Inc. v. Fireman's Fund Insurance Co.,* 535 F.2d 287 (5th Cir. 1976), rehearing denied 540 F.2d 1085 (1976).

The policy in question, entitled "Special Multi-Peril Policy—Part One" provides in part as follows:

> "In consideration of the provisions and stipulations herein . . . this Company, for the term of three years . . . does insure *the Insured named in the declarations* . . . against all direct loss by fire. . . ."
>
> "Assignment of this policy shall not be valid except with the *written consent* of this Company." (Emphasis added.)

Plaintiff contends that the transfer of the policy during Westminster's merger into Presbyterian occurred by operation of law and did not require Liberty's consent. However, the issue is not whether the policy passed by operation of law rather than by assignment. A close reading of both the *National American and Imperial Enterprises cases,* supra, reveals that the pivotal question is whether the transfer materially changes the original undertaking of the insurer to the extent that it should be afforded an opportunity to express its approval or disapproval. The court in *Imperial Enterprises* held the no-assignment clause inapplicable where two corporations had merged without notifying the insurer, but stated in a footnote to its opinion:

> "Like the *National American* court, see 501 F.2d at 1130 n.1, we choose not to rest our decisions solely on the fact that this transfer occurred by operation of law. Rather it is the *complete lack of any alteration in the insured—against risks* or hazards in this particular transfer that we find to be *the most compelling reason* for not applying the no-assignment clause in this case." 535 F.2d at 292 (Emphasis supplied.)

In the instant case, by contrast, a material alteration in the undertakings insured by Liberty did occur as a result of the merger of the two congregations. At the inception of the policy Westminster occupied and maintained the premises for church activities conducted on a regular basis. Following the merger, the combined congregations used Presbyterian's facilities, which are located elsewhere, and the Westminster structure was vacated by the named insured and at least to some extent fell into disrepair. By December 4, 1972, which was prior to the conveyance to Christ Gospel, windows and other fixtures had been broken and, as with any vacated building, the possibility of fire, whether by accident or intent, was substantially different than when it was occupied and regularly used and maintained. Consequently, under the facts in the instant case there is a compelling reason for requiring notice to Liberty of the merger as a condition precedent to continuing coverage for Presbyterian. Having failed to so notify Liberty and obtain its consent, Presbyterian cannot maintain a claim under the policy.

Assuming for the moment that notice of the merger was not required, Presbyterian is nevertheless barred from recovering because it retained no ownership interest in the policy following the assignment to Christ Gospel. Presbyterian argues that if assignment of the policy was invalid as to Liberty, it should also be invalid as between itself and Christ Gospel. This contention is devoid of merit and unsupported by the authorities.

As to third persons, a written assignment of a contract is valid without notice to the obligor even though he himself is not bound until the required notice is re-

ceived. 3 *Williston on Contracts* §422 (3rd ed. 1960) at 140; 3 P.L.E., Assignments §32 and cases cited therein. See generally *Portugese American Bank v. Wells,* 242 U.S. 7 (1916). This principle is applicable to contracts of insurance, whether the insurer expressly refused to consent or was never in fact notified of the assignment. See 16 *Couch on Insurance* 2d §63:168 at 741. Stated differently, although Presbyterian had no legal *right* under the policy to assign it without Liberty's consent, it did have the legal *capacity* to transfer its interest, if any, to Christ Gospel regardless of whether the policy remained enforceable in the hands of Christ Gospel.

We think it significant that in making the written assignment for a fair consideration, Presbyterian stated it "does hereby assign and set over [to Christ Gospel] *all right, title and interest in and to*" the fire policy. Not only did this language effectively divest Presbyterian of any future or further interest in the policy, but it also demonstrated that Presbyterian had no wish to maintain insurance on a property it no longer owned. Other evidence introduced at trial also corroborates the conclusion that Presbyterian divested itself of any interest in the insurance policy, and Presbyterian's statement in its argument brief (p. 19), that the no-assignment clause has no effect as between assignor and assignee, seems to admit that Presbyterian retained no interest in the policy after the assignment.

Assuming, arguendo, that Presbyterian somehow retained an ownership interest in the policy, the fact remains that it had no insurable interest in the building on the date of loss and for this additional reason cannot recover.

Presbyterian's theory that it retained an insurable interest despite the sale to Christ Gospel is based upon a clause in the deed which reads (in part) as follows:

> ". . . the Grantee (Christ Gospel) by acceptance of this deed does agree . . . that if at any time during the period of ten years next following the date hereof the principal purpose for which the premises . . . are used or to be used, should be other than Christian worship as aforesaid, the Grantee . . . shall, at the option of the Grantor, reconvey said premises to The Presbyterian Church of Harrisburg upon the repayment . . . of the consideration hereinabove set forth in this deed."

This provision, in effect, gave Presbyterian a right to repurchase the premises for $9,000.00 during the ten year period following the sale *if* the principal use of the building became other than a place of worship.

At most, this clause gave Presbyterian the *possibility* of obtaining an interest in the property at some time in the future, depending upon circumstances over which Presbyterian had no control. At the time of the fire Presbyterian had no interest in the premises whatever because there was no factual basis for the option to arise. We do not regard a contingent, indirect possibility of ownership, which cannot be controlled by the prospective optionee, as an interest which may be insured.

This conclusion is supported by our appellate courts, which appear to have last addressed the issue in *Van Cure v. Hartford Fire Ins. Co.*, 435 Pa. 163, 253 A.2d 663 (1969). In that case, condemned premises, upon which the condemnor had already filed a bond in the amount

of the purchase price, were destroyed by fire. The condemnee, who had remained in *possession* with the condemnor's permission, brought suit under two fire insurance policies purchased prior to the condemnation. The court held that despite the fact that the insured occupied the premises at the time of the loss, she had no insurable interest in the premises and recovery under the policies was denied.

In particular, the court rejected the condemnee's argument that her statutory option to repurchase the property (which arose only *IF* the condemnor abandoned the property without improvement within three years) created an insurable interest. The court noted that "while we *might* hold that an option to purchase is sufficient interest to sustain insurance, *the mere expectancy thereof is insubstantial and incapable of qualifying as an insurable interest. Van Cure,* supra at 435 Pa. 172 (emphasis supplied). Thus, not only is it established that Pennsylvania law does not recognize the mere expectancy of a purchase option as an insurable interest, but it is also questionable whether a *present* option to buy would qualify as an insurable interest. In addition, because Presbyterian had no right of possession at the time of the loss its potential "interest" is even less substantial than that possessed in *Van Cure.*

Even assuming this remote possibility could be insured, it would not be covered under the instant policy because of the fundamental changes in Westminster and Presbyterian's relationship to the premises and an insurer's right to make a fully informed choice of what and who it will insure, as more fully discussed above. Liberty agreed to insure a congregation in possession and control

of the premises. When that owner gives up not only possession but also ownership, and no longer exercises any control over the premises, an insurer is entitled to decide whether it wishes to insure risks and undertakings that may be materially greater and/or different than originally assumed. Changes of the magnitude involved in this case cannot be imposed inferentially upon an insurer or without its consent. This is the basic reason written notice of an assignment under the policy is required. Thus, even if Presbyterian could somehow overcome the other hurdles in its path it cannot recover because Liberty never agreed to insure Presbyterian or the situation that existed on the date of the loss.

We note, finally, that Presbyterian persists in a contention that Liberty has waived, or lost, its right to present certain defenses, or that it has raised additional defenses as the case has progressed. We find no basis for such assertions and believe Liberty has been consistent in its reasons for denying Presbyterian's claim. In Liberty's initial responsive pleading to the cross-complaint of Presbyterian the three areas discussed herein were specifically raised in defense. The instant trial was the first time Liberty was afforded the opportunity to directly litigate Presbyterian's claim and the defenses previously raised were all available to it.

For all of the foregoing reasons judgment must be granted to the defendant Liberty.

(s) William W. Caldwell, J.
William W. Caldwell, J.

Date: November 16, 1978

Opinion of Dauphin County Court
Order

IN THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY, PENNSYLVANIA
Civil Action—Law

No. 611 January Term, 1974
In Assumpsit and Trespass

CHRIST GOSPEL TEMPLE, by BISHOP F. M. THOMAS, Trustee ad Litem,

Plaintiff

v.

LIBERTY MUTUAL INSURANCE COMPANY, a Corporation,

Defendant

v.

PRESBYTERIAN CHURCH OF HARRISBURG, a non-profit corporation,

Additional Defendant

ORDER

AND NOW, November 16, 1978, the exceptions of Presbyterian Church of Harrisburg are dismissed and judgment is entered in favor of Liberty Mutual Insurance Company.

By the Court:
(s) William W. Caldwell, J.
William W. Caldwell, J.

Superior Court Judgment

SUPERIOR COURT OF PENNSYLVANIA
Harrisburg District

No. 242 March Term, 1978

CHRIST GOSPEL TEMPLE, by BISHOP F. M. THOMAS, TRUSTEE AD LITEM

v.

LIBERTY MUTUAL INSURANCE COMPANY, a Corporation

v.

PRESBYTERIAN CHURCH OF HARRISBURG, a non-profit corporation

APPEAL OF: Christ Gospel Temple by Bishop F. M. Thomas, Trustee Ad Litem, and Presbyterian Church of Harrisburg, a non-profit corporation.

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the Court of Common Pleas of Dauphin County is affirmed.

(s) Mildred E. Williamson
Deputy Prothonotary

Dated: December 21, 1979
(Seal)

Denial of Allocatur

SUPREME COURT OF PENNSYLVANIA
Middle District
P. O. Box 624
Harrisburg 17108

April 1, 1980

Richard C. Angino, Esquire
4503 North Front Street
Harrisburg, Pa. 17110

Re: Christ Gospel Temple, by Bishop F. M. Thomas, Trustee Ad-Litem, Petitioner v. Liberty Mutual Ins. Co. v. Presbyterian Church of Hbg., Petitioner

No. 5 M.D. MISC. DK., 1980

Dear Mr. Angino:

This is to advise you that on March 24, 1980 the Supreme Court entered its Order denying the Petition for Allowance of Appeal in the above-captioned matter.

Very truly yours,
Mildred E. Williamson
Deputy Prothonotary

MEW/sb
cc: James K. Thomas, Esquire

Denial of Reconsideration

SUPREME COURT OF PENNSYLVANIA
Middle District
P. O. Box 624
Harrisburg 17108

June 16, 1980

Richard C. Angino, Esquire
4503 North Front Street
Harrisburg, Pa. 17110

Re: Christ Gospel Temple, by Bishop F. M. Thomas, Trustee ad Litem, Petitioner v. Liberty Mutual Ins. Co. v. Presbyterian Church of Hbg., Petitioner

No. 5 M.D. MISC. DK., 1980

Dear Mr. Angino:

This is to advise you that on June 9, 1980, the Supreme Court entered its Order denying the Application for Reconsideration in the above-captioned matter.

Very truly yours,
(s) Mildred E. Williamson
Deputy Prothonotary

MEW/sb
cc: James K. Thomas, Esquire

Supreme Court, U. S.
FILED
OCT 6 1980
MICHAEL RODAK, JR., CLERK

No. 80-367

IN THE

Supreme Court of the United States

October Term, 1980

PRESBYTERIAN CHURCH OF HARRISBURG,
a non-profit Corporation,
Petitioner,

versus

LIBERTY MUTUAL INSURANCE COMPANY,
a Corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

JAMES K. THOMAS
JOSEPH P. HAFER
THOMAS & THOMAS, *of Counsel*
Attorneys for Respondent

212 Locust Street
P. O. Box 999
Harrisburg, Pennsylvania 17108
(717) 255-7600

BATAVIA TIMES, APPELLATE COURT PRINTERS
EDWARD W. SHANNON, EASTERN PENNSYLVANIA REPRESENTATIVE
SUITE E1111 PARK TOWNE EAST, 2200 BENJAMIN FRANKLIN PKWY.
PHILADELPHIA, PENNSYLVANIA 19130
PHONE: (215) 568-7788

Questions Presented for Review.

(1) Does not the Supreme Court of the United States lack jurisdiction to consider for the first time on Petition for Writ of Certiorari a claimed violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution, when that question was never presented, either explicitly or implicitly, to any of the courts below?

(2) Even if the equal protection issue is properly before this Court, do there exist adequate, independent non-federal grounds for affirmance of the opinion of the Superior Court of Pennsylvania?

(3) Does the opinion of the Superior Court of Pennsylvania, based upon the common law of the Commonwealth, holding that Petitioner had no insurable interest in the property in question violate the equal protection clause of the Fourteenth Amendment to the United States Constitution?

Page

TABLE OF CONTENTS.

	Page
Questions Presented for Review	i
Table of Citations	iii
Opinions and Judgments Below	1
Jurisdiction	2
Counter-Statement of the Case	3
Argument	8
A. The Supreme Court lacks jurisdiction to decide an issue presented by Petitioner for the first time on Petition for Writ of Certiorari to this Honorable Court	8
B. Independent, non-federal grounds exist for affirmance of the opinion of the Superior Court of Pennsylvania, and of the Court of Common Pleas of Dauphin County	9
1. Respondent did not consent to provide insurance coverage to Petitioner	10
2. Any interest held by Petitioner in the insurance policy issued by Respondent was divested by the assignment	12
C. The Superior Court's determination that Petitioner held no insurable interest in the Church premises does not offend the equal protection clause of the Fourteenth Amendment to the United States Constitution	15
Conclusion	19

Page

TABLE OF CITATIONS.

CASES:

Beck v. Washington, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed. 2d 98 (1962) 3,8,15

Cardinale v. Louisiana, 394 U.S. 437, 89 S.Ct. 1162, 22 L.Ed. 2d 398 (1969) 3

Donovan v. New York Cas. Co., 373 Pa. 145, 94 A.2d 570 (1953) 11

Fry Roofing Co. v. Wood, 344 U.S. 157, 73 S.Ct. 204, 97 L.Ed. 168 (1952) 12

Grayson v. Harris, 267 U.S. 352, 45 S.Ct. 317, 69 L.Ed. 652 (1925) 12

Herb v. Pitcairn, 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789 (1945) 9,10

Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 88 S.Ct. 1298, 20 L.Ed. 2d 225 (1968) 9

Labine v. Vincent, 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed. 2d 288 (1971) 14

Manhattan Life Ins. Co. v. Cohen, 234 U.S. 123, 34 S.Ct. 874, 58 L.Ed. 1245 (1913) 3

Marchant v. Pennsylvania Railroad Co., 153 U.S. 380, 14 S.Ct. 894, 38 L.Ed. 751 (1894) 18

McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed. 2d 393 (1961) 16

Murdock v. City of Memphis, 20 Wall. 590, 22 L.Ed. 429 (1875) 3,9,14

Olyphant Lumber Co. to the use of Patrick McGouldrick v. Peoples Mutual Livestock Ins. Co. of Philadelphia, 4 Pa. Super. Ct. 100 (1897) 11

Oxley Stave Co. v. Butler County, 166 U.S. 648, 17 S.Ct. 709, 41 L.Ed. 1149 (1897) 8

Page

Portland Railway, Light & Sign Power Co. v. Railroad Commission, 229 U.S. 397, 33 S.Ct. 820, 57 L.Ed. 1248 (1913) 12
Portugese-American Bank v. Welles, 242 U.S. 7, 37 S.Ct. 3, 61 L.Ed. 116 (1916) 13
Salyer Land Co. v. Tulare Water District, 410 U.S. 719, 93 S.Ct. 1224, 35 L.Ed. 2d 659 (1973) 15
Spires v. Hanover Ins. Co., 364 Pa. 52, 70 A.2d 828 (1950) 11
Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed. 2d 572 (1969) 3
Tacon v. State of Arizona, 410 U.S. 351, 93 S.Ct. 998, 35 L.Ed. 2d 346 (1973) 3
Turner v. Fouche, 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed. 2d 567 (1970) 15
Van Cure v. Hartford Fire Ins. Co., 435 Pa. 163, 253 A. 2d 663 (1969) 16,17,19,20

STATUTE:

28 U.S.C. §1257(3) 2

CONSTITUTIONAL PROVISION:

Fourteenth Amendment to the United States Constitution I,2,9,15,18,19

TEXT:

16 Couch on Insurance 2d §63: 168 12

IN THE

Supreme Court of the United States

October Term, 1980

No. 80-367

PRESBYTERIAN CHURCH OF HARRISBURG,
a non-profit Corporation,

Petitioner,

versus

LIBERTY MUTUAL INSURANCE COMPANY,
a Corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Opinions and Judgments Below

No opinion was rendered by the Supreme Court of Pennsylvania, that Court having refused to exercise its discretion to review the opinion of the Superior Court of Pennsylvania. The opinion of the Superior Court of Pennsylvania has not yet been reported officially, but was issued by the Court under Docket No. 242 March Term, 1978. This opinion affirmed the opinion of the Dauphin County Court of Common Pleas, 100 Dauphin Co. R. 391 (1978), and both opinions appear in the Appendix to the Petition for Writ of Certiorari. Both the common pleas and superior courts held, that on the date of the fire loss

in question, Petitioner could not collect under Respondent's fire insurance policy because it had a "mere possibility of an expectancy" that it might exercise an option to repurchase the subject property upon the happening of a contingency, and that under prevailing law this did not amount to an insurable interest. In addition, the Dauphin County Court of Common Pleas held, independent of this reason, that Petitioner was not entitled to recover because Respondent was not notified of a merger between Westminster Presbyterian Church (the named insured under Respondent's policy), and Petitioner; such notice being a condition precedent to continuing insurance coverage for Petitioner; and furthermore, that any arguable ownership interest Petitioner had in the insurance policy issued by Respondent was divested by Petitioner's own actions when it executed "for valuable consideration" a written assignment of its "rights, title and interest" in the policy to Christ Gospel, a congregation which had purchased the church building, and which later burned.

Jurisdiction

Petitioner purportedly bases the jurisdiction of this Court upon 28 U.S.C. §1257 (3). Nevertheless, jurisdiction is lacking in this honorable Court by virtue of the fact that Petitioner, despite numerous opportunities to do so, consistently failed to raise the issue, now sought to be reviewed in this court, before *any* of the Courts of the Commonwealth of Pennsylvania. Petitioner's attempt to raise the Fourteenth Amendment issue for the first time in its Petition for Writ of Certiorari to this Court, an issue never either explicitly or implicitly raised in those Courts, renders this Court without jurisdiction to entertain the issue.

This Court has consistently maintained that it lacks jurisdiction to review an issue first presented for review in the Supreme Court of the United States, which could have been presented to the courts below. *Tacon v. State of Arizona*, 410 U.S. 351, 93 S. Ct. 998, 35 L. Ed. 2d 346 (1973); *Street v. New York*, 394 U.S. 576, 89 S. Ct. 1354; 22 L. Ed. 2d 572 (1969); *Cardinale v. Louisiana*, 394 U.S. 437, 89 S. Ct. 1162, 22 L. Ed. 2d 398 (1969); *Beck v. Washington*, 369 U.S. 541, 82 S. Ct. 955, 8 L. Ed. 2d 98 (1962); *Murdock v. City of Memphis*, 20 Wall. 590, 22 L. Ed. 429 (1875).

Indeed, Petitioner concedes that it did not argue its constitutional claim in any of the courts below (Petition for Writ of Certiorari at 6). Instead, Petitioner relies upon certain dictum from *Manhattan Life Insurance Co. v. Cohen*, 234 U.S. 123, 34 S. Ct. 874, 58 L. Ed. 1245 (1913). It is noted that even that case fails to support Petitioner's plea that this Court accept jurisdiction. The case holds that it is irrelevant for this Court to inquire how and when a federal question was raised in a Court below *when it appears that question was actually considered and decided.* No such claim has been made in this case; nor could it be made. Accordingly, the Petitioner having failed to address his claims, initially, to the Courts below, this Court lacks jurisdiction to decide the questions presented in the Petition.

Counter-Statement of the Case

The following facts were stipulated to by Petitioner and Respondent, parties below:

1. Westminster Presbyterian Church for many years owned a church structure at the corner of Green and Reily Streets in the City of Harrisburg, Dauphin County, Pennsylvania.

2. In May of 1968, Westminster Presbyterian Church and Defendant [Respondent], Liberty Mutual Insurance Company, entered into a three year contract of insurance whereby Liberty Mutual provided a multi-peril insurance policy which protected the Westminster Church property, its contents and its fine arts, with limits of $250,000.00, $12,000.00 and $47,719.00 coverages respectively. This policy was renewed for an additional three year period from 1971 through 1974. A premium covering the period from May of 1972 through May of 1973 was requested by Liberty and paid on behalf of Westminster.

3. On August 13, 1972, Westminster Presbyterian Church merged into Presbyterian Church of Harrisburg [Petitioner], and Presbyterian then acquired the former Westminster premises.

4. On December 19, 1972, Presbyterian sold the Church building and executed a written "assignment" of the Liberty insurance policy to Christ Gospel Temple for a consideration of $750.00. The parties executed a document entitled "Assignment of Insurance Policy".

5. The Liberty policy provides "assignment of this policy shall not be valid except with the written consent of this Company". There was no written consent by Liberty Mutual to the assignment nor actual notice of the assignment.

6. The Deed for the Church premises dated December 6 contained the following provision: "THIS conveyance is made in this Deed delivered on the condition and reservation hereinafter set forth,

and by the acceptance of the same the Grantee binds itself, its successors and assigns, as follows: Inasmuch as faithful members of the former Westminster Presbyterian Church have by their individual and corporate commitment over a period of nearly a century dedicated these premises to the worship of God and Christ, and the consideration agreed to herein is premised largely on the desire that such use be continued, the Grantee by acceptance of the Deed does agree for itself, its successors and assigns, that if at any time during the period of ten years next following the date hereof, a principal purpose for which the premises or any part thereof (including the present structure or any other structure to be built thereon) are used or to be used should be other than Christian worship as aforesaid, the Grantee, its successors or assigns, at the option of the Grantor, reconvey said premises to the Presbyterian Church of Harrisburg upon repayment or tender of repayment by the said The Presbyterian Church of Harrisburg to the Grantee, its successors or assigns, of the consideration hereinabove set forth in this Deed."

7. On February 19, 1973, the previously mentioned Church building sustained substantial fire damage which was one of the listed coverages under the Liberty policy.

8. Following the fire, Liberty was advised of the merger, the sale, the purported assignment of the coverage and Liberty requested both Christ Gospel Temple and Presbyterian to sign a nonwaiver agreement, which they did.

> 9. After completing its investigation, Liberty disclaimed coverage on the basis that neither Christ Gospel nor Presbyterian had an insurable interest because of the merger and sale and because of the fact that Liberty had no notice nor had it given its consent to the assignment of the Liberty policy.

With respect to stipulated fact No. 4, the "Assignment of Insurance Policy" provided as follows:

> "*FOR VALUE RECEIVED*, the Presbyterian Church of Harrisburg successor by merger to Westminster Presbyterian Church *does hereby assign and set over all right, title and interest* in and to the hazard insurance policy together with all Riders and coverages as such contracts are now in effect, being a Special Multi-Peril Policy of Liberty Mutual Insurance Company, No. KA 1-531-018430-011, unto Christ Gospel Temple, which Policy provides coverages for the Church building known as Westminster Presbyterian Church, located at the northeast corner of Green and Reily Streets in the City of Harrisburg, Dauphin County, Pennsylvania." (emphasis added).

Petitioner seeks to cloud the issue before this Court by interjecting irrelevant matters, such as references to Christ Gospel Temple being a small black congregation, and referring to the Westminster structure as a "beautiful stone building, which eventually gained recognition as an historic landmark." (Petition for Writ of Certiorari at 4). Moreover, Petitioner neglects to mention that following the merger of Westminster with Presbyterian, the Westminster structure was vacated by Westminster, and at least to some extent fell into disrepair. By December 4, 1972, which was prior to the conveyance to Christ Gospel, windows and other fixtures had been broken, and, as with any vacated building, the possibility of fire,

whether by accident or intent, was substantially different than when it was occupied and regularly used and maintained. These facts were specifically found by the Court of Common Pleas, sitting without jury (Appendix to Petition for Writ of Certiorari at 16a). Finally, Petitioner neglects to mention that the purported assignment of the insurance policy to Christ Gospel Temple was for a separate consideration of $750, which amount approximated the unexpired premium paid in advance by Westminster, not Petitioner, for the then current year. These facts, as well, were found by the Court below (Appendix to Petition for Writ of Certiorari at 11a).

Finally, after a non-jury trial, the Court of Common Pleas articulated three bases for concluding that Petitioner was not insured by Respondent's policy at the time of the loss:

> "(1) Liberty [Respondent] was not notified of the merger between Westminster and Presbyterian [Petitioner];
>
> (2) Any arguable ownership interests of Presbyterian in the policy was divested by Presbyterian's own act when it executed 'for consideration' a written assignment of its own 'right, title and interest' in the policy to Christ Gospel; and
>
> (3) Presbyterian had no insurable interest in the property in any event." (Appendix to Petition for Writ of Certiorari at 13a-14a).

Although *each* of these bases was legally sufficient to support the verdict in favor of Respondent, Petitioner attacks only the third basis, and on a ground never presented to any of the courts below. Thus, not only is it clear that this Court is without jurisdiction to determine the issue as phrased by Petitioner, but as well, there exists two independent, non-federal grounds for affirmance of the Courts below.

ARGUMENT

A. The Supreme Court lacks jurisdiction to decide an issue presented by Petitioner for the first time on Petition for Writ of Certiorari to this Honorable Court.

It is fundamental that when ample opportunity exists to present a question to the lower courts, this Court lacks jurisdiction to entertain such question presented for the first time in this Court, absent exceptional circumstances. *See Beck v. Washington*, 369 U.S. 541, 82 S. Ct. 955, 8 L. Ed. 2d 98 (1962), and cases cited in the Jurisdictional section of this brief. As stated in *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 17 S. Ct. 709, 41 L. Ed. 1149 (1897):

> "The jurisdiction of this Court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such Court intended to assert a Federal right." 166 U.S. at 655, 17 S. Ct. at 711, 41 L. Ed. at 1152.

Petitioner totally ignores this fundamental rule of Supreme Court jurisprudence in seeking review of the question presented, by raising it for the first time in this Court. The failure is inexplicable. From the outset of this entire litigation, Petitioner was presented with Respondent's defense that it had "no insurable interest" in the property in question. This defense was raised in the initial pleadings, and was consistently argued by Respondent before the Court of Common Pleas of Dauphin

County, the Superior Court of Pennsylvania, and in opposition to Petitioner's Petition for Allowance of Appeal to the Supreme Court of Pennsylvania.*

Clearly, Petitioner was more than fully aware that this was to be a central issue in the case. Nevertheless, Petitioner wholly failed to raise the Fourteenth Amendment argument now pressed before this Court. Under these circumstances, no principle could be clearer but that this Court is without jurisdiction to entertain the instant Petition for Writ of Certiorari. Accordingly, the Petition should be dismissed.

B. Independent, non-federal grounds exist for affirmance of the opinion of the Superior Court of Pennsylvania, and of the Court of Common Pleas of Dauphin County.

This Court has consistently adhered to the self-imposed principle that it will not review a state court judgment which rests upon adequate and independent, non-federal grounds, even in the event that a federal question is involved and perhaps wrongly decided. *Murdock v. City of Memphis*, 20 Wall. 590, 635, 22 L. Ed. 429, 444 (1875). As succinctly stated in *Herb v. Pitcairn*, 324 U.S. 117, 65 S. Ct. 459, 89 L. Ed. 789 (1945):

> "The reason is so obvious that it has rarely been through to warrant statement. It is found in the partitioning of power between the state and federal

* It appears Petitioner has sought a Writ of Certiorari directed to the wrong court. The instant Petition is addressed to the Supreme Court of Pennsylvania; however, the only Pennsylvania appellate court to review the case on the merits was the superior court. The Pennsylvania Supreme Court, in its discretion, declined to review this case in any fashion. Accordingly, it would appear that the instant petition should be addressed to the Pennsylvania Superior Court. *See, e.g., Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 88 S. Ct. 1298, 20 L. Ed. 2d 225 (1968).

> judicial systems and in the limitation of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights, and our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its view of federal laws, our review could amount to nothing more than an advisory opinion." 324 U.S. at 125-126, 65 S. Ct. at 463, 89 L. Ed. at 794.

Two such grounds clearly exist in the present case.

1. Respondent did not consent to provide insurance coverage to Petitioner.

First, as found by the Dauphin County Court of Common Pleas, Respondent was not notified of the merger between Westminster and Presbyterian, and under the facts as found by the court, it therefore, found a compelling reason for requiring such notice as a condition precedent to the existence of insurance coverage for Petitioner. The policy in question contains a condition on the front page which provides that "assignment of this policy shall not be valid except with the written consent of the company [Respondent]." The court held, having failed to so notify Liberty [Respondent] and obtain its consent, Presbyterian [Petitioner] could not maintain a claim under the policy. As pointed out by the Superior Court, the provision in question is not simply a self-protective clause inserted at the whim of Liberty, but rather is a *legislatively mandated* provision *specifically required* to be included in fire insurance policies such as the one at issue in this case. (Appendix to Petition for Writ of Certiorari at 6a).

Pennsylvania law has consistently held that a contract for fire insurance is a personal contract, which affords the insurer the right to choose with whom it will contract. *Donovan v. New York Cas. Co.*, 373 Pa. 145, 94 A.2d 570 (1953); *Spires v. Hanover Ins. Co.*, 364 Pa. 52, 70 A. 2d 828 (1950); *Olyphant Lumber Co. to the use of Patrick McGouldrick v. Peoples Mutual Livestock Ins. Co. of Philadelphia*, 4 Pa. Super. Ct. 100 (1897). Thus, as the Court of Common Pleas held, the merger between Westminster, the named insured, and Presbyterian, did not result in Presbyterian becoming an insured under the insurance policy in question.

Three reasons exist for this under the facts of the case. First, neither Westminster nor Presbyterian gave notice of the merger to the Defendant. This omission violated the nature of the contract in general, and specifically violated the provision of the policy which stated that coverage shall only be provided for the "insured named in the declaration", *i.e.*, Westminster. Second, in addition to failing to notify the Respondent of the merger and also that Westminster was no longer holding the policy, both Westminster and Presbyterian failed to obtain Respondent's written consent to any assignment of the policy, as required by the anti-assignment provision and Pennsylvania statutory law.

Finally, the facts bear out that the merger between Westminster and Presbyterian caused an abandonment of the church structure for a period of time, during which the building fell into disrepair. Obviously, this is factual evidence of a material increase in the risk which the Respondent had insured for Westminster and, taken together with the merger, the subsequent sale of the pro-

perty, and the assignment of the policy to Christ Gospel, it is also factual evidence of a "material alteration in the undertakings insured by Liberty". All of these were found as fact by the trial court. It is to be noted that factual determinations such as these are not reviewable by this Court, absent exceptional circumstances, none of which are asserted by Petitioner or are present here. *Fry Roofing Co. v. Wood*, 344 U.S. 157, 73 S. Ct. 204, 97 L. Ed. 168 (1952); *Grayson v. Harris*, 267 U.S. 352, 45 S. Ct. 317, 69 L. Ed. 652 (1925); *Portland Railway, Light & Sign Power Co. v. Railroad Commission*, 229 U.S. 397, 33 S. Ct. 820, 57 L. Ed. 1248 (1913).

2. Any interest held by Petitioner in the insurance policy issued by Respondent was divested by the assignment.

A second, independent, non-federal ground also exists for affirmance of the court below; that is, Petitioner divested itself of any interests it may have had in the insurance policy by virtue of its assignment of the policy to Christ Gospel. The assignment to Christ Gospel, while not creating enforceable rights in Christ Gospel, because the written consent of Respondent had not been secured, did not mean that the assignment was of no effect and that Petitioner remained an insured under the policy. This is impossible. The policy could not affect the rights of two churches *inter se*, and an assignment of the policy *did* occur between Petitioner and Christ Gospel, leaving no enforceable right in Petitioner, even if the policy was not enforceable by the assignee. No rights remained in the assignor, Petitioner. As stated in 16 Couch on Insurance 2d, §63: 168, at 741:

> "As the consent provision [of a policy] is designed for the protection of the insured, the failure or even refusal of the insured to give consent does not affect the validity of the assignment as between the assignor and the assignee or rival claimants to the fund."

Thus, as the court of common pleas pointed out, as to third persons, the written assignment of a contract is valid without notice to the obligor, even though he himself is not bound until the required notice is received. See generally *Portugese-American Bank v. Welles,* 242 U.S. 7, 37 S. Ct. 3, 61 L. Ed. 116 (1916). Accordingly, although Petitioner had no legal *right* under the policy to assign it without Respondent's consent, it did have the legal *capacity* to transfer its interests, if any, to Christ Gospel regardless of whether the policy remained enforceable in the hands of either. Once again, it is emphasized that a contract of insurance is a personal one and there are good public reasons for recognizing that Presbyterian assigned the policy and had no enforceable rights as an insured under it: with the assignment, which the law recognizes as complete between the churches, the risk may or may not have increased, and as found by the court of common pleas, the risk was substantially greater to Respondent. But clearly under the policy, Respondent had the *right* to be notified and to consent or not to assume the increased risk. No rights remained against Respondent in Petitioner, since the assignment was complete.

In this regard, the intent of the parties to the assignment was manifest. The assignment provided that Presbyterian does "hereby assign and set over *all right, title and interest in and to the hazard insurance policy* together with all Riders and coverage as such contracts are now in effect." Moreover, the assignment was accompanied by a separate consideration of $750, which amount approximated the unexpired premium paid in ad-

vance for then current year by Westminster. Thus, as the Court of Common Pleas held:

> "Not only did this language effectively divest Presbyterian of any future or further interest in the policy, but it also demonstrated that Presbyterian had no wish to maintain insurance on a property it no longer owned. Other evidence introduced at trial also corroborates the conclusion that Presbyterian divested itself of any interest in the insurance policy, and Presbyterian's statement in its argument brief (p. 19), that the no-assignment clause has no effect as between assignor and assignee, seems to admit that Presbyterian retained no interest in the policy after the assignment." (Appendix to Petition for Writ of Certiorari at 17a).

It bears emphasizing in this connection that these are *factual determinations* made by the court sitting without a jury. The case was decided on the basis of application of purely state law to those facts. Either of the aforecited grounds clearly would support the decision reached by the trial court and the superior court, *independent* of the federal issue now pressed. While Petitioner requests this Court to do so, the Constitution does not invest this Court with the power to overturn a state court determination of applicable state law under the guise of constitutional interpretation merely because this Court might believe that it can provide a better rule or decision. *Murdock v. City of Memphis, supra; cf. Labine v. Vincent,* 401 U.S. 532, 91 S. Ct. 1017, 28 L. Ed. 2d 288 (1971). Accordingly, there being two independent, non-federal grounds to support the lower courts' decision in this case, the Petition must be dismissed.

C. The Superior Court's determination that Petitioner held no insurable interest in the Church premises does not offend the equal protection clause of the Fourteenth Amendment to the United States Constitution.

Petitioner concedes, as it must, that the applicable test to be applied in this case is whether the challenged classification rests upon grounds wholly irrelevant to the achievement of a valid state objective. *Turner v. Fouche,* 396 U.S. 346, 90 S. Ct. 532, 24 L. Ed. 2d 567 (1970). Stated another way, the test is whether *any* state of facts reasonably may be conceived to justify the state's decision. *Salyer Land Co. v. Tulare Water District,* 410 U.S. 719, 93 S. Ct. 1224, 35 L. Ed. 2d 659 (1973). Moreover, as stated in *Beck v. Washington,* 369 U.S. 541, 82 S. Ct. 955, 8 L. Ed. 2d 98 (1962), the Fourteenth Amendment does not insure uniformity of judicial decisions or immunity from judicial error. In a nutshell, this is the core of Petitioner's argument: that the common pleas and superior courts wrongly applied the common law doctrine of insurable interest, and in so doing, precluded Petitioner from recovery under the policy issued to Westminster by Respondent. Such an argument must be unavailing.

The Fourteenth Amendment permits a wide scope of discretion to states in enacting laws which effect some groups of citizens differently from others. The Constitutional safeguards afforded by that amendment are offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective. Thus, the states are presumed to have acted within their constitutional powers, despite the fact that, in practice, their laws may result in some inequality. The equal pro-

tection clause goes no further than protecting against invidious discrimination. *McGowan v. Maryland,* 366 U.S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961).

Thus, even had Petitioner properly presented the equal protection issue to the courts below, and even if there were no adequate independent, non-federal grounds for the decision rendered below, Petitioner carries a heavy burden in asserting a constitutional violation of this magnitude. That burden is not here met.

The stated core of Petitioner's argument is that the superior court has denied the right to contract for insurance to a class of people with an expectancy of an option to purchase, while granting it to others similarly situated in terms of the value of their interest to them (Petition for Writ of Certiorari at 11). In so posing the question Petitioner misses the mark. As stated by both the court of common pleas and the superior court, petitioner did not have an "expectancy of an option to purchase"; rather, its interest, at best, was a "mere *possibility* of the expectancy that it might exercise its option to repurchase upon the happening of a contingency." (Appendix to Petition for Writ of Certiorari at 8a). At the time of the fire, Petitioner had no interest whatsoever in the premises because there was no factual basis for the option to arise. Thus, under prevailing Pennsylvania law, as set forth in *Van Cure v. Hartford Fire Ins. Co.,* 435 Pa. 163, 253 A. 2d 663 (1969), Petitioner possessed no "insurable interest" at the time of the fire.

Petitioner urges this Court that the decision by the superior court in the present case, and the declination to review that decision by the Supreme Court of Pennsylvania, has somehow worked a subtle change in the common law of Pennsylvania regarding insurable in-

terests. A close examination of the *Van Cure* opinion, however, reveals that the instant case falls squarely within the *Van Cure* rule. Thus, no "subtle change" has been worked.

Petitioner ignores the fundamental policy underlying the opinions in *Van Cure* and in the present case. The requirement of an insurable interest is founded upon a valid public policy against wagering, and is well established in the common law. *See* discussion in *Van Cure*, 435 Pa. at 166, 253 A. 2d at 664. Thus, the Pennsylvania courts have consistently held that a policy holder must have an interest that will be damaged before he will be permitted to recover for the loss against for which he was insured. Petitioner makes much of the distinction between the "legally enforceable interest" theory and the "factual expectation" theory; however, as the superior court pointed out, Petitioner had no interest under *either* theory. This determination was wholly consistent with the previous holding of the Pennsylvania Supreme Court in *Van Cure*.

Moreover, Petitioner would have this court believe that it was powerless to protect whatever "interest" it claims it possessed. Certainly, there were any number of ways Petitioner could have protected its alleged interest. For example, Petitioner could have procured insurance upon its contingent contract rights with Christ Gospel. *Cf. Van Cure v. Hartford Fire Ins. Co.*, 435 Pa. at 171, 253 A. 2d at 667 ("[t]he rights listed might support a policy insuring against the possibility of the default of bond but not against any hazard to the property."). It could also have protected itself by requiring *Christ Gospel* to procure insurance covering the premises, thus guaranteeing a fund to rebuild the church. Thus, while under Penn-

sylvania law Petitioner had no "insurable interest" in the *property* in question, a number of other options were open to it, which would have guaranteed the very result now sought—the obtaining of a fund with which to restore the property. All of these options were open to Petitioner, yet were not pursued. It is compound fallacy to equate Petitioner's lack of diligence with a deprivation of constitutionally guaranteed equal protection of the laws.

Finally, Petitioner has totally failed to show how it was treated differently from others *similarly situated.* This is the crux of the equal protection clause of the Fourteenth Amendment, and does in the last analysis, demonstrate the patent insufficiency of Petitioner's present claims.

In *Van Cure,* the Pennsylvania Supreme Court clearly held that the mere expectancy of an option did not qualify as an insurable interest under Pennsylvania law. At best, Petitioner here had such an expectancy (although the superior and common pleas courts classified the interest, if any, as at most a *possibility* of an expectancy. Appendix to Petition for Certiorari at 8a and 18a-19a). Thus, Petitioner falls within the *same* classification as that outlined in *Van Cure.* As such, Petitioner is not subjected to a treatment any different than other persons similarly situated, and accordingly, its equal protection claim must fail. *Cf. Marchant v. Pennsylvania Railroad Co.,* 153 U.S. 380, 14 S. Ct. 894, 38 L. Ed. 751 (1894).

Conclusion

Based upon the foregoing discussion, it is respectfully asserted that this Court lacks jurisdiction to entertain the constitutional challenge now advanced. The guiding precedents of this court clearly hold that an issue not properly raised in the courts below may not be presented to this Court for the first time by petition for writ of certiorari. Petitioner, without any excuse, entirely failed to present the issue to the courts of the Commonwealth of Pennsylvania. Under these circumstances, the Petition must be dismissed.

Furthermore, valid, independent non-federal grounds exist for upholding the decisions of the common pleas and superior courts. Respondent was never notified of the merger of the original congregation and Petitioner, and did not consent to coverage of Petitioner. Secondly, Petitioner voluntarily divested itself of any interests which it might have had in the policy when it transferred that policy, for valid consideration, to Christ Gospel. Since such valid grounds exist for affirmance of the court below, independent of the federal question now pressed before this Court, the Petition must be dismissed.

Finally, Petitioner would have this court hold that the time-honored doctrine of insurable interest, as consistently applied by the courts of the Commonwealth of Pennsylvania, both in the *Van Cure* decision and in the present case, has undergone a subtle transformation in such a manner as to work a deprivation of equal protection of the laws under the Fourteenth Amendment to the United States Constitution. Inexplicably, although *Van Cure* was clearly the law of the Commonwealth, Petitioner failed to press the constitutional issue below. Thus it is bar-

red from raising it here. Moreover, it is fallacy for Petitioner to assert its own neglect in protecting what interest it felt it had, when *Van Cure* was clearly the law of the Commonwealth, and to turn this inattentiveness into a deprivation of equal protection. This the court should not permit. A rational basis exists for the doctrine, both generally and as applied in this case, and Petitioner's plea for "class" treatment of all persons falling outside the scope of the *Van Cure* decision should not be entertained in this Court. Petitioner has failed to show that the application of the insurable interest rule is a classification which rests on grounds wholly irrelevant to the advancement of a valid state objective. To the contrary, Respondent has shown that a state of facts may reasonably be conceived to justify the theory. Finally, that doctrine was consistently applied to Petitioner and all others similarly situated.

For all the foregoing reasons, it is respectfully requested that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

JAMES K. THOMAS,
JOSEPH P. HAFER,
THOMAS & THOMAS,
of Counsel,
Attorneys for Respondent.

212 Locust Street,
P.O. Box 999,
Harrisburg, Pennsylvania 17108,
(717) 255-7600.